Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Petitioner,

v.

ROHM and HAAS COMPANY, a corporation of the State of Delaware, ATOHAAS AMERICA, INC., a corporation of the State of Delaware; RESIN MANAGEMENT CORP., a corporation of the State of Florida, PETER C. BLYTH, individually and JOHN DOES 1 through 10, being fictitious names for persons whose identities are unknown,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Does a District Court have the right or power under the inherent powers of the court to effectively dismiss a complaint as a sanction when no order or direction of the court has been violated and the complainant has not engaged in bad faith?

2. Does a District Court have the right or power to effectively dismiss a complaint as a sanction under any provision of the Federal Rules of Civil Procedure when no order or directions of the court have been violated and the complainant has not engaged in bad faith?

Actions Of The District Court Giving Rise To The Questions Presented.

In this case, Petitioner, Claude P. Bamberger, International, Inc. ("Bamberger") sued its long time sole supplier of scrap acrylic, defendant-appellee-Rohm and Haas Company ("Rohm and Haas") and Bamberger's competitor, Resin Management Corporation ("Resin"), a Florida corporation, and Resin's President and sole owner, Peter C. Blyth ("Blyth"), a citizen of Florida, for breach of the implied covenant of good faith and fair dealing, tortious interference with prospective business advantage, fraudulent bidding and breach of express, implied and constructive contract. Jurisdiction was based on 28 U.S.C.§§ 1332, 1331 and 1337.

On August 22, 1997, during the course of discovery, the Magistrate Judge ordered Rohm and Haas to produce a report of an internal investigation conducted by Wayne G. Davis, ("the Davis Report") Rohm and Haas' Director of Corporate Security at the behest of its Chairman J. Lawrence Wilson as a result of letters received by him from employees of Rohm and Haas and Bamberger complaining of improprieties in Rohm and Haas respecting the sale of acrylic scrap by em-

ployees of Rohm and Haas and Blyth. The Davis Report had been withheld by Rohm and Haas on grounds of the attorney-client privilege and work product immunity, although Rohm and Haas did eventually identify the 12 persons interviewed and/or mentioned in the report.

When Rohm and Haas appealed the order to produce the Davis Report to the District Court, the Magistrate Judge, on an application from Rohm and Haas, entered a stay of the order pending appeal.

On November 14, 1997, a hearing was held before the Magistrate Judge on discovery matters. At that hearing the Magistrate Judge *sua sponte* and without any request by defendants, reduced the number of depositions that Bamberger could take as set forth in the Rule 16 Conference from 15 to 10. *Nevertheless, the Magistrate Judge directed that Bamberger delay depositions of those persons mentioned in the Davis Report until after the District Court decided Rohm and Haas' appeal so as not to depose them twice.*

The Magistrate Judge also set discovery to end in 90 days. Rohm and Haas' appeal to the District Court was likely to be decided in sufficient time for Bamberger to decide who to take and when with the benefit of the Davis Report and still meet the discovery cut-off date.

The District Court Judge affirmed the Magistrate Judge's decision by Opinion and Order filed December 29, 1997. Nevertheless, on January 27, 1998 Rohm and Haas appealed to the Third Circuit Court of Appeals. The stay of producing the Davis Report continued.

At this point, Bamberger was put to an election not of its own choice. Take depositions of non-Davis Report witnesses and sacrifice the right to take an equal number of Davis Report witnesses without having the benefit of the Davis Report, or take one or more of the Davis Report witnesses without the benefit of the Davis Report and be unable to re-depose them

after production of the Davis Report, or use all 10 depositions allowed by the Magistrate Judge, to take Davis Report witnesses after a decision on Rohm and Haas' continued appeal, *as permitted by the Magistrate Judge.*

On February 11, 1998, before expiration of discovery, a status conference was held before the Magistrate Judge at which time Bamberger requested an extension of the discovery period. An extension would have permitted Rohm and Haas' appeal to the Third Circuit on the Davis Report to run its course, and if affirmed, allow Bamberger to comply with the Magistrate Judge's admonition not to depose those witnesses twice yet permit Bamberger to depose such witnesses. It would also have provided Bamberger the right to make a selection of the 10 witnesses who could be deposed with the benefit of the Davis Report, which the District Court had already ordered be produced.

Instead of granting Bamberger's speaking motion to extend the discovery period at the Case Management Conference on February 17, 1998, at the direction of the Magistrate Judge, Bamberger filed a formal motion to extend the discovery period.

On May 27, 1998, the Magistrate Judge denied Bamberger's motion to extend the discovery period. At the same time, the Magistrate Judge, *sua sponte*, and without any motion by defendants, sanctioned Bamberger for not having taken any depositions within the prior 90 days, by denying Bamberger the right to take any of the Davis Report witnesses after a final decision on appeal. *There was no order of the court, warning or admonition that Bamberger had to take any, let alone some undefined number of depositions during the 90 day period as a condition precedent to taking any Davis Report witnesses after a final decision of Rohm and Haas' appeal as directed by the Magistrate Judge to avoid taking the Davis Report witnesses twice.*

This decision by the Magistrate Judge, affirmed by the District Court was the functional equivalent of dismissing Bamberger's complaint. Without any depositions, even of only the Davis Report witnesses, there was little, if any, chance of Bamberger surviving a motion for summary judgment. This turned out to be the case.

LIST OF PARTIES

All parties in the courts below are listed in the caption to this petition.

RULE 29.6 STATEMENT

In accordance with Sup. Ct. R. 29.6, petitioner states that it does not have any publicly owned corporate parent, subsidiary or affiliate.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	v
RULE 29.6 STATEMENT	v
TABLE OF CONTENTS	vi
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
BASIS OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	10
ARGUMENT	
The Magistrate Judge Sanctioned Bamberger For Not Deposing Some Unspecified Number of non-Davis Report Witnesses In The 90-Day Period Before The Scheduled Close Of Discovery	11
There Was No Basis For The Imposition Of Sanctions Against Bamberger Under Fed. R. Civ. P. 37(b)(2) or Fed. R. Civ. P. 16(f)	13
The District Court Lacked The Power Under The Inherent Powers Of The Court To Sanction Bamberger	15
CONCLUSION	18
APPENDIX	
United States District Court for the District of New Jersey, Order for Summary Judgment, Filed October 6, 2000	A-1

United States District Court for the District of New Jersey, Opinion, Filed October 6, 2000..... A-3

United States Court of Appeals for the Third Circuit, Memorandum Opinion, Filed September 24, 2001 ..... A-26

United States Court of Appeals for the Third Circuit, Judgment, Filed September 24, 2001..... A-35

United States Court of Appeals for the Third Circuit, Order on Motion to File a Supplemental Reply Brief, Dated September 24, 2001 ..... A-37

United States Court of Appeals for the Third Circuit, Order on Motion by Appellant for Leave to File Petition for Rehearing Out of Time, Dated October 18, 2001 ..... A-38

United States Court of Appeals for the Third Circuit, Order on Sur Petition for Rehearing, Dated October 30, 2001 ..... A-39

United States District Court for the District of New Jersey, Opinion, Dated April 23, 1999..... A-42

United States District Court for the District of New Jersey, Order, Dated August 23, 1999..... A-54

TABLE OF AUTHORITIES

Page(s)

Cases:

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 11, 13, 15, 17

Degen v. United States, 517 U.S. 820 (1996)..... 16, 17

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites De Guinea, 456 U.S. 694 (1982)..... 11

Link v. Wabash R. Co., 370 U.S. 626 (1962) 16

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)..... 15, 16

Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 357 U.S. 197 (1958) 11, 14, 15, 17

Young v. United States, ex rel. Vuitton et Fils, S. A., 481 U.S. 787 (1987)..... 17

Statutes:

15 U.S.C. § 1125(a)..... 1

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 ..... i, 1

28 U.S.C. § 1332(a)(1)..... i, 1

28 U.S.C. § 1337 i

28 U.S.C. § 1367 1

28 U.S.C. § 2071 *et seq.* 13

Rules:

Fed. R. Civ. P. 16 3

Fed. R. Civ. P. 16(f) 10, 12, 13, 14, 18

Fed. R. Civ. P. 26(a)(1) 9
Fed. R. Civ. P. 26(d) 3
Fed. R. Civ. P. 26(f) 13
Fed. R. Civ. P. 35 13
Fed. R. Civ. P. 37 ..... 12, 13, 14, 17
Fed. R. Civ. P. 37(b)(2) 10, 12, 13, 14, 18
Fed. R. Civ. P. 41(b) 18
Fed. R. Civ. P. 60(b) 16
L. Civ. R. 72.1 (c)(1)(A) 8

Claude P. Bamberger International, Inc. ("Bamberger") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed on September 24, 2001, affirming the order of the District Court granting summary judgment in favor of Rohm and Haas, Resin and Blyth.

OPINIONS BELOW

The September 24, 2001 opinion and order of the Court of Appeals is unreported and appears in the Appendix hereto (A-26 to A-36). The opinion and order for summary judgment of the District Court filed October 26, 2001, affirmed by the Court of Appeals upon which this petition is based, is unreported and appears in the Appendix hereto (A-1 to A-25). An order and opinion of the District Court affirming the Magistrate Judge's refusal to extend or reopen discovery is unreported and appears in the Appendix hereto (A-41 to A-55).

BASIS OF JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 2001. Petitioner filed a petition for rehearing and suggestion for rehearing *en banc* which was denied on October 30, 2001 (A-39 to A-40). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The District Court had jurisdiction to hear Petitioner's claims under 15 U.S.C.§ 1125(a) and 28 U.S.C. §§1331, 1332(a)(1) and 1367. The Court of Appeals for the Third Circuit had appellate jurisdiction under 28 U.S.C. §1291.

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Bamberger is a purchaser for resale of acrylic scrap. It enjoyed a nearly 40 year business relationship with Rohm and Haas and for many years had purchased acrylic scrap gener-

ated by Rohm and Haas in a number of its manufacturing plants. At the request of Rohm and Haas, Bamberger developed foreign markets for this scrap in Asia. The relationship between Bamberger and Rohm and Haas was always very good.

The business relationship between Bamberger and Rohm and Haas was on a personal basis between Claude Bamberger and his wife, Mo-Li Siow and personnel in the various Rohm and Haas plants. Prices were established by negotiation and sales generally on open contracts, which were continued by both parties beyond their nominal termination dates.

Beginning in about 1989, a management official of Rohm and Haas having control of its Matamoros, Mexico plant, which had been selling scrap to Bamberger, signed an exclusive contract with the predecessor of Resin, then owned by Blyth and another, whom Blyth bought out and thereafter created Resin. Bamberger was thereby precluded from bidding on scrap generated by that plant and all of it went to Blyth and his corporate entities.[1] At that time, Blyth had no previous experience in the business, Resin had no storage facilities and no employees other than Blyth and his associate. Bamberger protested this exclusionary arrangement but to no avail.

Thereafter, Bamberger alleges that Rohm and Haas began a campaign of shifting all of its scrap business from Bamberger to Resin despite the fact that Bamberger was offering higher prices. Rohm and Haas clandestinely gave preferences to Resin, cutting Bamberger off from essentially its sole source of supply. Bamberger alleged that when Rohm and Haas introduced a bidding mechanism and Bamberger was the successful bidder, scrap which should have gone to Bamberger was clandestinely diverted to Resin at lower prices than those

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[1] In its complaint, Bamberger charged that Resin was the *alter ego* of Blyth.

offered by Bamberger. At first, Rohm and Haas claimed it had no scrap to sell, but when challenged by Bamberger, Rohm and Haas admitted to selling to Resin, claiming that it had secretly decided not to sell all of its scrap by bid.

Ultimately, Rohm and Haas excused its conduct by telling Bamberger that Resin and Blyth better met its needs without further explanation.[2]

Bamberger filed its complaint on March 5, 1996. All defendants were served by March 20, 1996. Blyth moved to dismiss the complaint against him for lack of personal jurisdiction. The District Court denied Blyth's motion challenging jurisdiction on June 21, 1996. The Magistrate Judge did not issue an order until September 16, 1996 setting the Rule 16 Conference for October 23, 1996. As provided by the Fed. R. Civ. P. 26(d), the parties were not permitted to engage in discovery until the initial scheduling conference. Resin served its responses to Bamberger's paper discovery on December 20, 1996, replete with the blanket objections that the interrogatories and document requests were "overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence."

In December 26, 1996 and on January 16, 1997 Rohm and Haas served Bamberger with responses to Bamberger's interrogatories and requests for production of documents.

By virtue of having been interviewed, Bamberger was already aware of the Davis Report. Rohm and Haas refused to produce the Davis Report on grounds of the attorney-client privilege and work product immunity, although it did eventually identify the 12 persons interviewed and/or mentioned in the report. On February 20, 1997, Bamberger, as directed by

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[2] A more full description of the conduct of Rohm and Haas can be found in the Declarations of Mo-Li Siow contained in the Appendix filed with the Court of Appeals.

the Magistrate Judge, filed a motion on short notice to compel Rohm and Haas to produce the Davis Report.

On August 12, 1997, the Magistrate Judge issued an Opinion and Order compelling Rohm and Haas to produce the Davis Report. When Rohm and Haas appealed from the Order, the Magistrate Judge, on an application from Rohm and Haas, entered a stay of the Order pending the appeal to the District Court Judge.

On November 14, 1997, a hearing was held before the Magistrate Judge on unresolved discovery disputes in Bamberger's motion to compel interrogatory answers and document demands. During this hearing, the Magistrate Judge *sua sponte* and without any request by defendants, reduced the number of depositions that Bamberger could take from 15 to 10. *Nevertheless, the Magistrate Judge directed that Bamberger delay taking the depositions of those persons mentioned in the Davis Report, until after the District Court decided Rohm and Haas' appeal so as not to depose them twice.*

At this point, Bamberger was put to an election not of its own choice. Take depositions of non-Davis Report witnesses and sacrifice the right to take an equal number of Davis Report witnesses without having the benefit of the Davis Report, or, take one or more of the Davis Report witnesses without the benefit of the Davis Report and be unable to re-depose them after production of the Davis Report, or, use all 10 depositions allowed by the Magistrate Judge to take Davis Report witnesses after a decision by on Rohm and Haas' continued appeal, *as permitted by the Magistrate Judge.*

The Magistrate Judge also set discovery to end in 90 days. Rohm and Haas' appeal to the District Court was likely to be decided in sufficient time for Bamberger to decide who to take and when, with the benefit of the Davis Report, and still meet the discovery cut-off date. The decision of the Magistrate Judge was memorialized in an Order of December 5, 1997.

As of the hearing on November 14, 1997, there was time, albeit potentially little time, for Bamberger to take depositions after a decision on the appeal to the District Court. What neither Bamberger nor the Magistrate Judge could know, was that Rohm and Haas would appeal any affirmance by the District Court to the Third Circuit. On December 29, 1997, the District Court affirmed the Magistrate Judge's August 12, 1999 Order to produce the Davis Report. Rohm and Haas appealed to the United States Court of Appeals for the Third Circuit. The stay on producing the report was continued, compounding Bamberger's dilemma.[3] There was now about six weeks before the discovery cut-off.

Now, by yet another appeal, Rohm and Haas had frustrated, the intention of both the Magistrate Judge and the District Court that Bamberger have the benefit of the use of the Davis Report in determining who to take and when, of the limited number of depositions permitted. Believing the Davis Report witnesses, numbering more than the number of depositions permitted, to be the most important witnesses, and *abiding by the directions of the Magistrate Judge*, Bamberger elected to defer deposing those witnesses until a decision by the Third Circuit. For complying with the Magistrate Judge's directions, and without violating any orders of the court, Bamberger was *sanctioned* by *sua sponte* being deprived of the right to take any depositions, even of the Davis Report witnesses.

On February 11, 1998, before expiration of discovery, a status conference was held before the Magistrate Judge at which time Bamberger requested an extension of the discovery period. This extension would have permitted Rohm and Haas' appeal to the Third Circuit on the Davis Report to run

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[3] The Davis Report, when finally produced by Rohm and Haas disclosed the existence of documents in the possession of Rohm and Haas which were obviously not privileged and have never been produced by Rohm and Haas even to this day.

its course, and if affirmed, allow Bamberger to comply with the Magistrate Judge's admonition not to depose those witnesses twice, yet permit Bamberger to depose such witnesses once. It would also have provided Bamberger the right to make a selection of the 10 witnesses who could be deposed with the benefit of the Davis Report which the District Court had already ordered be produced.

Instead of granting Bamberger's speaking motion to extend the discovery period at the Case Management Conference on February 17, 1998, at the direction of the Magistrate Judge, Bamberger filed a formal motion to extend the discovery period.

On May 27, 1998, the Magistrate Judge denied Bamberger's motion to extend the discovery period. At the same time, the Magistrate Judge, *sua sponte*, sanctioned Bamberger for not having taken any depositions within the prior 90 days by denying Bamberger the right to take any of the Davis Report witnesses after a final decision on appeal.[4] *There was no order of the court, warning or admonition that Bamberger had to take any, let alone some undefined number of depositions during the 90 day period as a condition precedent to taking any Davis Report witnesses after a final decision of Rohm and Haas' appeal as directed by the Magistrate Judge to avoid taking the Davis Report witnesses twice.*

This decision by the Magistrate Judge, affirmed by the District Court was the functional equivalent of dismissing Bamberger's complaint. Without any depositions and with the

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[4] The Magistrate Judge never suggested that Bamberger elect to take the deposition of any Davis Report witness before a decision by the Third Circuit if one were taken and thereby either sacrifice the right to take that deposition after a decision or take such depositions twice. The whole object of not taking the depositions of the Davis Report witnesses was to prevent taking them twice. Simply stated, the Davis Report could and likely would provide additional information on how to examine those persons.

Magistrate Judge's drastic limitation of the scope of Bamberger's paper discovery, there was little, if any, chance of Bamberger surviving a motion for summary judgment on those issues. This turned out to be the case.

On June 12, 1998, Bamberger moved for reconsideration of the May 27, 1998 Order denying Bamberger's motion to extend the discovery period. On July 14, 1998, the Magistrate Judge denied Bamberger's motion for reconsideration of the May 27, 1998 Order.

As part of its reconsideration motion, Bamberger accepted the Magistrate Judge's prior invitation (not order) to substantiate the allegations in the complaint by filing a lengthy and detailed Declaration of Mo Li Siow ("Siow") Bamberger's Vice President. In her declaration, Siow presented an exhaustive analysis of the documents which had been produced by the defendants. This analysis showed a number of important discrepancies between documents produced by Rohm and Haas and Resin as well as the likelihood that certain documents ordered produced had not been produced. This analysis showed unexplained preferences given to Resin at the expense of Bamberger. These preferences showed that Rohm and Haas had long since decided to terminate doing business with Bamberger, had hid that fact from Bamberger, stringing Bamberger along, until it was too late for Bamberger to find alternative sources of supply.

The Magistrate Judge denied Bamberger's motion for reconsideration in an Opinion and Order filed July 14, 1998. In that Opinion, the Magistrate Judge dismissed the Siow Declaration as merely rehashing the complaint. Bamberger appealed from the May 27, 1998 and July 14, 1998 Orders pursuant to L. Civ. R. 72.1 (c)(1)(A) on July 29, 1998.

On September 23, 1998, the District Court affirmed the Magistrate Judge's Orders of May 27 and July 14, 1998 denying Bamberger's motion to extend the discovery period.

On July 16, 1998, the United States Court of Appeals for the Third Circuit entered a Briefing and Scheduling Order for the appeal regarding production of the Davis Report. Knowing that Bamberger had effectively been denied any deposition discovery and therefore having nothing to fear, on August 21, 1998, a few days before its appellate brief was due, Rohm and Haas voluntarily produced the Davis Report and moved to dismiss its own appeal. By Order dated September 14, 1998, the appeal was dismissed.

The Davis Report consists of 13 pages. The first four pages are a memorandum dated September 29, 1995, authored by Wayne Davis, and addressed to Albert Caesar, President of AtoHaas. The memo recounts that Larry Wilson, Chairman of Rohm and Haas, had received three letters, the first dated July 29, 1995, an anonymous letter apparently from a Rohm and Haas employee describing allegations of improprieties in the disposal of acrylic scrap — the same allegations made by Bamberger in this lawsuit. A second anonymous letter, also apparently from a Rohm and Haas employee at another location from the first, said essentially the same thing. The third letter, dated August 16, 1995, was from Claude Bamberger.

The memo by Davis goes on to describe the protocol for the investigation and provides a conclusion to his findings. The two anonymous letters (mentioned above) which were purportedly written by Rohm and Haas employees located at the Louisville and Bristol plants, respectively, were produced to Bamberger only after the close of discovery.

Based upon the newly found evidence contained in the Davis Report, on September 25, 1998, Bamberger filed a motion to reopen discovery. On October 15, 1998, the Magistrate Judge denied Bamberger's motion prior to Bamberger filing a reply brief and on October 28, 1998, denied Bamberger's motion to file a reply brief. On November 4, 1998, Bamberger appealed the Magistrate Judge's denial of Bam-

berger's motion to reopen discovery but the District Court affirmed the Magistrate Judge.

On January 28, 1999, while the appeal of the Magistrate's Judge's refusal to reopen discovery was still pending, Bamberger filed a motion to take *de bene esse* depositions of certain witnesses who were named in the Davis Report and outside the trial subpoena power of the court to preserve their testimony for trial. On February 25, 1999, the Magistrate Judge entered an Order and Opinion denying Bamberger the right to take depositions *de bene esse*. In his decision, the Magistrate Judge refused to take judicial notice that witnesses identified by defendants in their Fed. R. Civ. P. 26(a)(1) disclosures as living and working in Florida, Texas, Tennessee, and Kentucky were outside of the 100 mile radius of the subpoena power of the Court.

On August 23, 1999, the District Court affirmed the Magistrate Judge's denial of Bamberger's motion to reopen discovery, based upon the production of the Davis Report and its motion to take *de bene esse* depositions.

On June 29, 2000, Resin and Rohm and Haas moved for summary judgment. Bamberger filed opposition and cross-moved to take additional discovery.

On October 26, 2000, the District Court granted Resin and Rohm and Haas' motions for summary judgment and denied Bamberger's cross-motion for additional discovery to take the depositions of the Davis Report witnesses. In its opinion, the District Court chose to dismiss the declaration of Siow almost in its entirety, characterizing it as containing "impermissible legal conclusions and hearsay." In the process, the District Court characterized statements made by Rohm and Haas employees directly to Siow as hearsay.

The District Court also denied Bamberger's motion to take the deposition of an affiant of Rohm and Haas, filed in support of its motion for summary judgment which offered in-

formation never previously provided by Rohm and Haas, on the grounds that he had not been previously deposed.

REASONS FOR GRANTING THE PETITION

The District Court affirmed the Magistrate Judge's sanctioning of Bamberger for not taking some unspecified number of non-Davis Report witnesses within a 90-day period prior to the scheduled close of discovery. This affirmance stripped Bamberger of the previously given right to take depositions of the most important Davis Report witnesses after resolution of Rohm and Haas' appeal of the Order compelling it to produce the Davis Report. The deprivation of the right to depose these persons, was tantamount to dismissal of the complaint. There is no dispute that no order existed requiring Bamberger to take any depositions of anyone during the 90-day period preceding the scheduled close of discovery as a condition precedent to Bamberger exercising the right and directions of the Magistrate Judge, that depositions of the Davis Report witnesses not be taken before a decision on the appeal of Rohm and Haas challenging the order to produce that report.

The analysis as to whether Bamberger's Constitutional Right to Due Process under the Fifth Amendment has been violated must address whether a Magistrate Judge can impose a sanction under Rule 37(b)(2) on a party, when that party has not committed any sanctionable conduct under that rule. Similarly, the analysis must address whether the Magistrate Judge had the right to so sanction Bamberger under Fed. R. Civ. P. 16(f) for not deposing some unspecified, non-Davis Report witnesses within 90 days prior to the scheduled close of discovery when no order existed requiring such depositions. Lastly, the analysis must address whether the District Court has the power to affirm the conduct of the Magistrate Judge under the inherent power of the court, despite the fact that the Magistrate Judge did not and could not sanction Bamberger under the inherent power of the court, because the Magistrate Judge is not an Article III judge. Lastly, the analy-

sis must address whether the District Court had the power to sanction Bamberger under the inherent powers of the court or as "case management" as limited by The United States Supreme Court because Bamberger had not been guilty of bad faith.

In affirming the Magistrate Judge's imposition of sanctions, the District Court ignored controlling precedent of this Court such as *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197 (1958); and *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites De Guinea*, 456 U.S. 694 (1982).

The Magistrate Judge Sanctioned Bamberger For Not Deposing Some Unspecified Number of non-Davis Report Witnesses In The 90-Day Period Before The Scheduled Close Of Discovery.

When Bamberger moved to extend the discovery period before its end, the Magistrate Judge did not merely deny the extension. Rather, he reversed his prior directions not to take the Davis Report witnesses twice by deferring them until after Rohm and Haas' appeal was decided, whenever that may have been, and denied Bamberger the right to depose the Davis Report witnesses after the appeal was decided. *This was not merely a denial of the extension of discovery subtending the Davis Report witnesses but rather a sanction for the alleged breach of a non-existing order.* Moreover, the District Court affirmed the Magistrate Judge's denial of a number of Bamberger motions made thereafter for reconsideration.

In essence, the District Court affirmed the Magistrate Judge's sanctioning of Bamberger by denying it the right to take depositions of the Davis Report witnesses after a final decision on Rohm and Haas' appeal as approved and directed by the Magistrate Judge.

The Magistrate Judge, not being an Article III Judge could not invoke the inherent powers of the court as a basis for imposing the sanction imposed but rather only under Fed. R. Civ. P. 37(b)(2) or Fed. R. Civ. P. 16(f).[5] While the District Court had the *power* to exercise the inherent powers of the court, it did not do so but rather treated the Magistrate Judge's imposition of the sanction as "not contrary to law or clearly erroneous" as a sanction under Fed. R. Civ. P. 37(b)(2).[6] If the District Court chose to affirm the Magistrate Judge as a sanction under the inherent powers of the District Court, clearly it would have violated controlling precedent of this Court and Bamberger's Due Process rights under the Fifth Amendment to the Constitution of the United States.[7]

In the final analysis, the ultimate question is whether the District Court had the power under the inherent powers of the court to sanction Bamberger when Bamberger had violated no order or engaged in bad faith.

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[5] There was no suggestion by the Magistrate Judge that the sanction was permitted as "case management" rather than a sanction under Fed. R. Civ. P. 37. Had the Magistrate Judge just refused to extend the general discovery period but not sanctioned Bamberger by denying it the right to take the Davis Report witnesses after a decision by the Third Circuit *or* taken a less drastic remedy such as directing that the Davis Report witnesses proceed without the David Report being produced, the interests of "case management" would have been met.

[6] It is axiomatic that if there was no basis in law for the Magistrate Judge to have sanctioned it, then it was *per force* an abuse of discretion for the District Court to affirm for those reasons.

[7] In affirming the Magistrate Judge, the District Court did not address whether it was affirming the sanction as an application of Rule 37(b)(2), Rule 16(f) or the inherent powers of the court. Nevertheless, in denying Bamberger motion to reopen discovery after production of the Davis Report, the District Court made it clear that the basis for sanctioning Bamberger by depriving it of the right to depose Davis Report witnesses after a decision on Rohm and Haas' appeal was solely because Bamberger did not depose some unspecified number of non-Davis Report witnesses in the 90-day period before close of fact discovery. (A-43, A-47, A-51)

As will appear below, the District Court raised the inherent powers of the court for "case management" above the United States Constitution.

There Was No Basis For The Imposition Of Sanctions Against Bamberger Under Fed. R. Civ. P. 37(b)(2) or Fed. R. Civ. P. 16(f).

This Court has recognized that a District Court may not effectively rewrite or interpret the application of Fed. R. Civ. P. 37(b)(2) to cover acts or conduct not expressly covered by that rule because these rules were adopted by Congress exercising its Constitutional prerogative to provide district courts with a comprehensive arsenal of Federal rules and statutes to protect themselves from abuse. *See* dissent by Justice Kennedy in *Chambers*, 501 U.S. at 61, joined by the Chief Justice and Justice Souter, as well as 28 U.S.C. § 2071 *et seq.*

Fed. R. Civ. P. 37(b)(2) provides in relevant part:

> If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just. . .

Id.[8]

Nowhere in Rule 37 is a sanction to be imposed *unless there has been a violation of an order.* Rule 37(b)(2) applies only to violations of orders to provide or permit discovery including under Rule 37 (a) [motions for an order compelling disclosure or discovery]. Therefore, there was no basis in law

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[8] Fed. R. Civ. P. 26(f) deals with preparation for the Rule 16 Conference and Fed. R. Civ. P. 35 deals with Physical and Mental Examinations of Persons neither of which are implicated in this case.

for the Magistrate Judge to have sanctioned Bamberger under Fed. R. Civ. P. 37(b)(2).

Fed. R. Civ. P. 16(f) provides for sanctions for violation of a scheduling order. The scheduling order of the Magistrate Judge dated December 5, 1997 provided for the close of fact discovery in 90 days. Nevertheless, the Magistrate Judge also directed Bamberger to avoid taking the Davis Report witnesses twice by deferring their depositions until after a decision on the appeal of Rohm and Haas of the order directing it to produce the Davis Report.

Neither the Magistrate Judge nor the District Court justified reversing the prior directions of the Magistrate Judge about taking depositions of the Davis Report witnesses and imposing a bar on all such depositions under Rule 16(f). Obviously, the order scheduling the close of fact discovery had to be read with the directions of the Magistrate Judge which permitted and directed Bamberger's conduct. Therefore, the District Court affirmed the sanction based on Bamberger's not taking some unspecified number of non-Davis Report witnesses within the 90-day period. *No such order existed.*

In *Societe Internationale* this Court said:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, and *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case. The authors of Rule 37 were well aware of these constitutional considerations. *See Notes of Advisory*

> *Committee on Rules*, Rule 37, 28 U.S.C (1952 ed.), p. 4325, 28 U.S.C.A.

Societe Internationale, 357 U.S. at 209.

Therefore, it is abundantly clear that the use of Rule 37 sanctions are subject to the limitations imposed by this Court in *Chambers* on the exercise of the court's inherent powers. However, that is *not* to say that such are the only limitations imposed on the exercise of Rule 37. [9]

The District Court Lacked The Power Under The Inherent Powers Of The Court To Sanction Bamberger

The District Court lacked the power to sanction Bamberger under the inherent powers of the court. *Chambers,* 501 U.S. 32. *Chambers* involved the imposition of counsel fees as a sanction for bad faith saying:

> . . . the court found Chamber's actions were part of [a] sordid scheme of deliberate misuse of the judicial process 'designed' to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources.

Chambers, 501 U.S. at 57.[10]

This Court said: "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion. . . ." *Chambers,* 501 U.S. at 45, citing *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980). The majority in *Chambers* held that ". . . a court may assess attorney's fees when a party has 'acted in bad faith vexatiously, wantonly, or for oppressive reasons." (citations omitted) *Chambers,* 501 U.S. at 45.

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[9] Bamberger submits that the same limitations apply to at least Fed. R. Civ. P. 16(f).

[10] No such facts exist in this case.

In *Roadway Express*, this Court said:

> The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers.

Roadway Express, 447 U.S. at 767, n.14.

In *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) this Court affirmed the District Court's dismissal of the complaint by virtue of plaintiff's counsel's failure to attend the pretrial conference. However, the Court based it affirmance in part because of the failure of plaintiff's attorney to move the reopen under Fed. R. Civ. P. 60 (b) saying:

> Nor need we consider whether the District Court would have been abusing its discretion had it rejected a motion under Rule 60 (b) which was accompanied by a more adequate explanation for the absence of petitioner's counsel from the pretrial conference. No such motion was ever made, so that there is nothing in the record before us to indicate that counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect.

Link, 370 U.S. at 635-36.

In *Degen v. United States*, 517 U.S. 820 (1996), this Court said:

> Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991); *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962); *United States v. Hudson*, 7 Cranch 32, 34, 3 L. Ed. 259 (1812). The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch

> of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980). In many instances the inherent powers of the courts may be controlled or overridden by statute or rule. *Carlisle v. United States, ante*, at 426; *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 101 L. Ed. 2d 228, 108 S. Ct. 2369 (1988). Principles of deference counsel restraint in resorting to inherent power, *Chambers v. NASCO, supra*, at 44, and require its use to be a reasonable response to the problems and needs that provoke it, *Ortega-Rodriguez v. United States, supra*, at 244; *Thomas v. Arn*, 474 U.S. 140, 146-148, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985).[11]

Degen, 517 U.S. at 828.

In *Societe Internationale*, this Court rejected the court of appeals' reliance on inherent powers to uphold a dismissal of a complaint for failure to comply with a production order noting that "reliance upon . . . 'inherent power' can only obscure analysis of the problem" and finding that "whether a court has power to dismiss a complaint because of non-compliance with a production order depends exclusively upon Rule 37. *Societe Internationale*, 357 U.S. at 207.[12]

Under the broadest interpretation of *Chambers*, a sanction can be imposed under the inherent powers of the court only

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[11] *Cf.* Justice Scalia's concurring in judgment opinion in *Young v. United States, ex rel. Vuitton et Fils, S. A.*, 481 U.S. 787 (1987) that inherent powers are only those necessary to permit the courts to function. While the majority in *Chambers* did not require "necessity" for the exercise of the inherent powers of the court, necessity is still a factor under the requirement that the sanction go no further than required under the entirety of the circumstances of the case.

[12] *Cf.* Justice Kennedy's dissent, joined by the Chief Justice and Justice Souter in *Chambers*, 501 U.S. at 64-65.

when the party sanctioned has engaged in *bad faith*. The same limitation applies to the imposition of sanctions under Fed. R. Civ. P. 37(b)(2), 16(f) or 41(b). Bad faith cannot exist for violating an order that does not exist, or, for following the directions of the court.

CONCLUSION

The District Court lacked the power to deprive Bamberger of its right to depose the Davis Report witnesses as a sanction under either any provision of the Federal Rules of Civil Procedure or under the inherent powers of the court. The conduct of the District Court therefore violated Bamberger's right to due process under the Fifth Amendment to the Constitution of the United States.

Dated: January 28, 2002

Respectfully submitted,

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